FILED
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-456

In The

Supreme Court of the United States

October Term, 1990

WILLIAM K. REILLY, Administrator of the Environmental Protection Agency, et al.,

Petitioners,

v.

ROBERTA DELANEY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAVID S. BARON
Arizona Center for Law
in the Public Interest
3208 E. Fort Lowell
Suite 106
Tucson, Arizona 85716
(602) 327-9547

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether this Court should review the propriety of relief ordered by the Court of Appeals where petitioners did not challenge that court's authority to order such relief until a petition for rehearing, even though the relief had been specifically requested in the opening brief below.

2. Whether the Court of Appeals, in a case over which it concededly had jurisdiction under the Clean Air Act, properly directed the Administrator of the Environmental Protection Agency on remand to prepare a federal clean air plan for Arizona, where the Act expressly required the Administrator to prepare such a plan as a consequence of the court's decision on the merits.

TABLE OF CONTENTS

Page

Counterstatement of the Case 2

Reasons for Denying the Writ 5

Conclusion 10

TABLE OF AUTHORITIES

CASES:

Abramowitz v. U.S. EPA, 832 F.2d 1071 (9th Cir. 1987) 8

Arizona v. Thomas, 829 F.2d 834 (9th Cir. 1987) 9

City of Seabrook v. EPA, 659 F.2d 1349 (5th Cir. 1981) 3

City of Seabrook v. Costle, 659 F.2d 1371 (5th Cir. 1981) 7

Connecticut Fund for the Environment v. EPA, 672 F.2d 998 (2d Cir. 1982) 8

Consolo v. Federal Maritime Commission, 383 U.S. 607 (1966) 8

District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975) 5

EEOC v. FLRA, 476 U.S. 19 (1986) 6

Environmental Defense Fund v. EPA, 852 F.2d 1316 (D.C. Cir. 1988) 8

Ford Motor Co. v. N.L.R.B., 305 U.S. 364 (1939) 9

General Motors Corp. v. United States, 110 S. Ct. 2528 (1990) 5, 6, 7

Hoover v. Ronwin, 466 U.S. 558 (1984) 6

TABLE OF AUTHORITIES – Continued

Page

Indiana & Michigan Electric Co. v. EPA, 733 F.2d 489 (7th Cir. 1984) 8

McCarthy v. Thomas, 17 Envtl. L. Rep. (Envtl. L. Inst.) 21214 (D. Ariz. 1987) 3, 4

McCarthy v. Thomas, 18 Envtl. L. Rep. (Envtl. L. Inst.) 21025 (D. Ariz. 1988) 4

Natural Resources Defense Council v. EPA, 478 F.2d 875 (1st Cir. 1973) 7

Natural Resources Defense Council v. Environmental Protection Agency, 475 F.2d 968 (D.C. Cir. 1973) 7

Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975) 8

Pennsylvania v. EPA, 500 F.2d 246 (3rd Cir. 1974) 5

Sierra Club v. Indiana-Kentucky Electric Corp, 716 F.2d 1145 (7th Cir. 1983) 3

Sierra Club v. EPA, 719 F.2d 436 (D.C. Cir. 1983) 8

STATUTES:

Administrative Procedure Act, 5 U.S.C. §706 9

Clean Air Act, 42 U.S.C. §§7401 et seq.

§110(c), 42 U.S.C. §7410(c) 3, 7

§172(a), 42 U.S.C. §7502(a) 3

§304, 42 U.S.C. §7604 ..... 4, 7, 8, 10

§307, 42 U.S.C. §7607 ..... 4, 7, 8, 10

Clean Air Act Amendments of 1977, Pub. L. No. 95-95, §129(c) 3

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

53 Fed. Reg. 17378 (1988) 5

55 Fed Reg. 41204 (Oct. 10, 1990) 2

136 Cong. Rec. S16953 (daily ed. Oct. 27, 1990) 10

1 W.H. Rodgers, Jr., Environmental Law:

Air & Water §3.3 (1986) 8

No. 90-456

In The

Supreme Court of the United States

October Term, 1990

WILLIAM K. REILLY, Administrator of the Environmental Protection Agency, et al.,

Petitioners,

v.

ROBERTA DELANEY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondents Roberta Delaney, Gayle Hartmann, David Horley, Alma Williams, Maureen Mageau-Decindis, and Brian McCarthy hereby oppose the petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

COUNTERSTATEMENT OF THE CASE

For purposes of this brief, respondents incorporate the statement of facts and historical background as set forth by the court of appeals. Petition for Writ of Certiorari (Petition) at 2a-3a. The following statement clarifies several key points.

1. Respondents' opening brief in the court of appeals specifically requested, among other things, that the court direct the Administrator of the Environmental Protection Agency (EPA) to disapprove the Arizona state implementation plan (SIP) and promulgate a federal implementation plan (FIP) within six months. Brief for Petitioners at 43, *Delaney v. EPA*, 898 F.2d 687 (9th Cir. 1990). EPA's responding brief did not specifically oppose this request for relief or in any way suggest that the court of appeals lacked authority to enter such an order. It was not until the Agency filed its petition for rehearing, after the court had issued its decision and order, that EPA questioned the propriety of ordering FIP promulgation on remand.

2. EPA did not request a stay of the court of appeals' mandate. Instead, the Agency indicated its intention to comply with the six month deadline for preparing a federal plan. Petition at 12. EPA issued its proposed FIP on September 20, 1990, and published the proposal in the Federal Register on October 10, 1990. 55 Fed. Reg. 41204 (Oct. 10, 1990). On October 29, 1990, EPA filed a motion in the Ninth Circuit requesting a two month extension of the November 26, 1990 deadline for FIP promulgation. That motion is still pending as of this writing.

3. The requirement that EPA promptly prepare a FIP was not an invention of the court of appeals. Section 110(c) of the Clean Air Act (the Act) expressly requires federal plan preparation upon EPA disapproval of a state implementation plan. Courts have uniformly held that the plan preparation duty arises automatically upon a finding of state plan inadequacy. *See e.g., Sierra Club v. Indiana-Kentucky Electric Corp.*, 716 F.2d 1145, 1153-54 (7th Cir. 1983); *City of Seabrook v. EPA*, 659 F.2d 1349, 1352-53 (5th Cir. 1981); *McCarthy v. Thomas*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 21214, 21217 (D. Ariz. 1987). Moreover, prior to the Ninth Circuit decision, EPA's duty to promulgate a FIP for Arizona had been firmly and finally established in the district court proceeding. Thus, in ordering EPA to disapprove the Arizona SIP – an order that EPA does not contest – the court of appeals necessarily triggered the Agency's plan promulgation duty as well. The Court's remand order simply directed EPA to do what the statute and the prior district court decision unmistakably required at that point.

4. The Ninth Circuit's order came in the context of a long history of EPA delays in implementing the Clean Air Act in Arizona. The Act required the state to submit a SIP by 1979 adequate to ensure attainment of clean air standards by the end of 1982. 42 U.S.C. §7502(a); Pub. L. No. 95-95, §129(c). It further imposed the federal promulgation duty on EPA to ensure that the attainment deadline would be met if the state faltered. In Arizona, EPA did not take final action on the Arizona SIP until 1986, and refused to commence promulgation of a federal plan until ordered to do so by the district court in 1987. By the time this matter reached decision in the Ninth Circuit, Arizona

was more than eleven years delinquent in preparation of an adequate clean air plan, and nearly eight years delinquent in meeting clean air standards. The process would have been protracted even further if respondents had been forced to return to the district court for another order requiring federal plan promulgation.

5. The Act's judicial review provisions do not confer exclusive jurisdiction on the district courts to order federal plan promulgation. Although §304(a)(2) allows the district courts to order EPA performance of non-discretionary duties, it does not by its terms limit such authority exclusively to the district courts. Nor does §307, under which the Ninth Circuit exercised jurisdiction below, contain any language limiting the type of remedy that an appellate court can order in reviewing EPA action in approving a state implementation plan. As further discussed below, both courts and commentators have concluded that courts of appeals can order EPA to perform non-discretionary duties in matters properly brought before such courts under §307 of the Act.

6. In the district court proceedings, EPA raised many of the same arguments that it now presents against being required to adopt a federal plan within six months: e.g., that the time frame is insufficient and that the demands on Agency resources are too great. The district court rejected these arguments, and EPA chose not to appeal. *McCarthy v. Thomas*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 21214, 21216-17 (D. Ariz. 1987), 18 Envtl. L. Rep. (Envtl. L. Inst.) 21025, 21026 (D. Ariz. 1988). Moreover, EPA does not have to start from scratch in preparing a federal plan for Arizona. The carbon monoxide problem in Phoenix and Tucson has been the subject of numerous

studies over the past eleven years (*see e.g.*, Petition at 9a), and the Agency has very recent experience in drafting a proposed federal plan for Arizona. 53 Fed. Reg. 17378 (1988). In other cases, EPA has promulgated federal implementation plans within approximately six months. *See e.g., District of Columbia v. Train*, 521 F.2d 971, 978 (D.C. Cir. 1975), *vacated on other grounds sub nom, EPA v. Brown*, 431 U.S. 99 (1977); *Pennsylvania v. EPA*, 500 F.2d 246, 249 (3rd Cir. 1974).

REASONS FOR DENYING THE WRIT

This Court's long standing practice has been to refrain from reviewing questions not raised in a timely manner in the proceedings below. Because EPA did not object to respondents' request for a federal plan promulgation order until after the decision below, review should accordingly be denied. This Court's decision last term in *General Motors Corp v. United States*, 110 S. Ct. 2528 (1990), provides no conceivable basis for vacating and remanding this case for further consideration by the court of appeals. *General Motors* simply held that EPA is not barred from bringing suit to enforce an existing state implementation plan where the Agency has delayed action on a proposed revision to that plan. The decision says nothing whatsoever about a circuit court's authority to enter appropriate remand orders upon finding that EPA has illegally approved a deficient state plan under the Act. Courts of appeals have routinely issued remand orders directing EPA to perform nondiscretionary duties where those duties are set forth explicitly in the Act and flow directly from the court's decision on the merits of a

petition for review. A plan promulgation order was particularly apt under the unique circumstances of this case, where EPA had already once before been ordered to prepare a federal plan and compliance with clean air standards was more than seven years past due.

1. The general rule is that this Court will decline review on issues not raised in a timely manner below. *See EEOC v. FLRA*, 476 U.S. 19, 24 (1986). The rule applies with full force where, as here, the issue was not raised until a petition for rehearing in the court of appeals. *Hoover v. Ronwin*, 466 U.S. 558, 574 n. 25 (1984). The Agency's tardiness strongly suggests that its challenge to the relief requested is little more than an afterthought. The fact that EPA did not seek to stay the Ninth Circuit's mandate and has already published its proposed FIP further undermines any claim that the remand order raises serious problems deserving of this Court's attention.

2. This Court's decision in *General Motors* is completely irrelevant to the correctness of the Ninth Circuit's remand order below. The sole issue in *General Motors* was whether EPA could be barred from bringing suit to enforce an existing state implementation plan on the ground that the Agency had unreasonably delayed action on a proposed revision to that plan. The Court found no enforcement bar because the Act did not reveal any congressional intent to preclude enforcement under the circumstances. 110 S. Ct. at 2533-34. The decision says nothing whatsoever about the authority of the circuit courts to enter appropriate remand orders in Clean Air Act cases, and does not hold that district courts have

exclusive authority to order EPA performance of non-discretionary duties. The Court's opinion does note in passing that §304 of the Act provides one possible avenue of relief for unreasonable EPA delay, but does not in any way suggest that the district courts have the sole authority to order EPA compliance with the statute. 110 S. Ct. at 2534.

Even if *General Motors* is read more broadly to hold that the courts may not supplant statutory remedies under the Act with judicially created ones, the decision below is unaffected. The remedy ordered by the Ninth Circuit, federal plan promulgation by EPA, is precisely the one mandated under §110(c) of the Act. It was not created by some inference of the court as was the enforcement bar in *General Motors*. Nor is there any language in the Act expressly precluding a circuit court from enforcing the clear mandate of §110(c). To the contrary, §307 expressly confers *exclusive* jurisdiction on the courts of appeals to act on petitions for review such as the one in this case. *See e.g., City of Seabrook v. Costle*, 659 F.2d 1371, 1373 (5th Cir. 1981).

3. There is nothing novel or unusual in the Ninth Circuit's remand order in this case. Other circuit courts have ordered EPA to promulgate federal plan provisions upon finding that the Agency had illegally approved inadequate state plans. *See, e.g., Natural Resources Defense Council v. EPA*, 478 F.2d 875, 888-91 (1st Cir. 1973); *Natural Resources Defense Council v. Environmental Protection Agency*, 475 F.2d 968, 970-72 (D.C. Cir. 1973). Circuit courts have also routinely issued remand orders directing EPA to perform other non-discretionary duties, where those duties flowed directly from the court's decision on

the merits of a petition for review. *See, e.g., Environmental Defense Fund v. EPA*, 852 F.2d 1316, 1331 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 1120 (1989); *Abramowitz v. U.S. EPA*, 832 F.2d 1071, 1075-76, 1078-79 (9th Cir. 1987); *Sierra Club v. EPA*, 719 F.2d 436, 469-70 (D.C. Cir. 1983), *cert denied*, 468 U.S. 1204 (1984); *Connecticut Fund for the Environment v. EPA*, 672 F.2d 998, 1009 n. 24 (2d Cir.), *cert denied*, 459 U.S. 1035 (1982). The decisions recognize that there is considerable overlap between the Act's judicial review provisions, §§304 and 307, and that the circuit courts are not precluded from ordering EPA to carry out mandatory duties in cases properly before them under §307 merely because similar relief might be available in the district court under §304. *See also Indiana & Michigan Electric Co. v. EPA*, 733 F.2d 489, 490-91 (7th Cir. 1984); *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 661 n.9 (D.C. Cir. 1975); 1 W.H. Rodgers, Jr., Environmental Law: Air & Water §3.3 at 197 (1986). The arbitrary limitation on circuit court powers urged by EPA would result in repeated games of "jurisdictional badminton" between the court of appeals and the district court that would seriously undermine enforcement of the Act. *See Abramowitz v. U.S. EPA*, 832 F.2d at 1075-76.

This Court has likewise ruled that once court of appeals jurisdiction over administrative action is provided by statute, it may be extended in the interests of judicial economy to include closely related matters that otherwise would be subject to review in district court. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 616-617 (1966). On a petition for review, a court of appeals may exercise equitable powers in its choice of remedy as long as it remains within the bounds of the

statute and does not intrude into the administrative province. *Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 373 (1939). *See also* 5 U.S.C. §706(1) (requiring reviewing courts to compel Agency action unlawfully withheld or unreasonably delayed). Here, the court of appeals has prudently exercised its powers and prevented a needless waste of judicial resources by directing EPA to do what the Clean Air Act plainly required under the circumstances. The court's order does not in any way intrude upon matters that are wholly within the Agency's discretion, and in that respect this case is plainly distinguishable from those cited by EPA (Petition at 9-10) limiting judicial interference in matters of Agency judgment.

4. EPA's assertions about the inadequacy of the time allowed for plan preparation are unfounded. As already noted above, much of the groundwork for an Arizona implementation plan had already been completed before the court of appeals decision below, and the district court has previously rejected EPA claims that a six month time frame is inadequate for the task. The brevity of the public comment period on EPA's pending plan proposal is due to the Agency's delay in publishing the proposal – it is hardly the fault of the court of appeals. Nor can EPA seriously complain about the court of appeals' refusal to allow EPA to approve yet another Arizona SIP submittal in lieu of adopting a federal plan. Given the consistent inadequacy of the state's submissions for more than a decade, and the fact that EPA had already once been ordered to promulgate a federal plan, the court of appeals was fully justified in requiring firm and final action by EPA itself. *See Arizona v. Thomas*, 829 F.2d 834, 839 (9th Cir. 1987).

5. On October 27, 1990, Congress completed passage of the Clean Air Act Amendments of 1990. As of this writing, these amendments have yet to be signed by the President, and respondents have been unable to secure an official copy.[1] The respondents are informed that the amendments do not make any material changes in the Act relevant to the sole issue raised by EPA in its petition for certiorari – namely, the authority of the circuit courts to order FIP promulgation as part of a remand order. The bill apparently does not alter the relevant language of §307(b)(1) of the Act under which the Ninth Circuit exercised jurisdiction below, or the relevant language of §304(a) concerning district court authority to order EPA performance of nondiscretionary duties. *See* 136 Cong. Rec. 16953 (daily ed. Oct. 27, 1990) (statement of Senate Managers).

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVID S. BARON
Arizona Center for Law
in the Public Interest
3208 E. Fort Lowell Road
Tucson, Arizona 85716
(602) 327-9547
Counsel for Respondents

November 9, 1990

---

[1] The bill was passed on the very last day of the session, and printing was apparently delayed due to the press of end of session business.